IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of	)	
	)	Case No. S 197503
GARY D. GRANT,	)	
State Bar No. 173665	)	State Bar Case No. 09-C-12232
	)	
A Member of the State Bar.	)	
	)	
	)	

REPLY BRIEF IN SUPPORT OF PETITION OF THE CHIEF TRIAL COUNSEL OF THE STATE BAR OF CALIFORNIA FOR WRIT OF REVIEW OF THE DECISION OF THE STATE BAR COURT

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I. INTRODUCTION

Setting aside the question of whether or not a felony conviction of knowing possession of child pornography constitutes moral turpitude *per se* and issues regarding the admissibility of certain evidence, these essential facts are undisputed: (1) respondent Grant was convicted of felony possession of child pornography, (2) he is a registered sex offender for life, (3) he intentionally misled the State Bar Court at trial and offered other evasive testimony, and (4) he twice violated his probation shortly after his conviction. These facts alone warrant Grant's disbarment and a finding that he is unworthy of representing the profession and upholding his duties as a credible officer of the court. Only his disbarment will maintain the public's confidence in and respect for the profession.

A two-year period of actual suspension is simply insufficient to maintain and advance the integrity of the Bar and to protect the public. Together with his failure to express appropriate remorse and failure to

accept responsibility for his crime as well as other relevant evidence establishing Grant's culpability, his removal from membership is essential.

II. ARGUMENT

A. This Matter Is Appropriate For Review

Grant's opinion that this matter is not appropriate for review because the State Bar Court does not require guidance is meritless. (Resp.'s Answ., pp. 13-14.) Grant does not dispute the fact that there are no reported cases from this Court ruling on the appropriate sanction to impose on attorneys convicted of felony possession of child pornography. (State Bar's Pet., p. 12.) Nor does Grant dispute the fact that there are no reported California cases concluding that felony possession of child pornography constitutes moral turpitude. (State Bar's Pet., p. 14.)

Instead, Grant simply offers that the State Bar Court Review Department has consistently entered summary orders concluding that possession of child pornography is a crime which may or may not involve moral turpitude. (Resp.'s Answ., pp. 13-15.) Absent binding precedent by this Court, the State Bar Court is guided by the published opinions of the Review Department. (Rules of Procedure of the State Bar, State Bar Rule 5.159(B).) There appear to be no published Review Department opinions on this topic and thus there is no binding guidance under bar rules on the State Bar Court in future child pornography possession cases if review is not granted by this Court.[1]

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[1] Respondents inevitably stipulate to disbarment rather than face a

This case presents an important unanswered question of law and policy for this Court under its plenary power to regulate the practice of law - whether the possession of child pornography constitutes moral turpitude *per se*, and raises the supplemental issue of whether the recommended discipline is appropriate in light of the record as a whole. Accordingly, review by this Court is warranted. (See *In Re Attorney Discipline System* (1999) 19 Cal.4th 582, 600, 602 (this Court retains its power to control any disciplinary proceeding at any step and it has the primary policy-making role and responsibility in matters concerning the practice of law).)

B. Respondent's Felony Conviction Involves Moral Turpitude *Per Se*

Grant's argument that a felony conviction for possession of child pornography does not constitute moral turpitude is unpersuasive. His simple comparison between crimes that have historically warranted summary disbarment and those crimes that have not is of minimal guidance. Possession of child pornography is a unique crime given the profound impact of its long term and lingering harm. All the crimes identified by

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trial on the merits. In each Review Department matter cited by Grant to support his contention (Resp.'s Answ., p. 14, ns. 2 & 3), the respondents stipulated to disbarment: (1) in *In the Matter of Robert C. Fishman*, respondent stipulated to disbarment (membership number 110630, conviction referral case number 09-C-10197), Supreme Court case number S188841); (2) in *In the Matter of Walter R. Luostari*, respondent stipulated to disbarment (membership number 94326, conviction referral number 09-C-12413, Supreme Court case number S194982); and (3) in *In the Matter of Thomas H. Merdzinski*, respondent stipulated to disbarment (membership number 152148, conviction referral number 08-C-13180, Supreme Court case number S191624).

Grant involve physical crimes against individuals (assault, battery, hit and run, statutory rape, child molestation) or transient crimes (terrorist threats, possession with intent to sell heroin). The lasting detrimental impact of child pornography is what makes this crime unique and subject to the most severe sanction that this Court can render.

In effect, images of child pornography are evidence of a crime scene depicting the sexual exploitation of a child. By definition, child pornography captures on film the physical and mental sexual abuse of children. This sexual victimization continues from the photography session, through processing of the photos or film, and onward to its distribution. Children are sexually exploited in two ways, first by being sexually abused and then again, by the lifetime circulation of their abuse through the distribution system of child pornography. In 1982, the Supreme Court declared in its first child pornography case that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." (*New York v. Ferber* (1982) 458 U.S. 747, 757.) With the advent of the internet, the distribution of child pornography has become ubiquitous and easily accessible in ways unimagined, thereby increasing in exponential terms the physiological and emotional damage of the abused child.

Against this background, the State Bar takes particular issue with Grant's statement that his crime of felony possession of child pornography does not indicate his "willing [participation] in the criminal child pornography industry." (Resp.'s Answ., p. 25.)

First, Grant admitted that he "willfully, unlawfully and knowingly" possessed child pornography. (State Bar Exh. 4, p. 3.) Consequently, notwithstanding his continuing effort to minimize his crime, he pleaded guilty, not to misdemeanor possession but to felony possession and admitted that he did so with willful and knowing intent.

Second, in *Osborne v. Ohio* the Supreme Court considered for the first time the constitutional legitimacy of a state statute proscribing possession of child pornography. Concluding that Ohio was well within constitutional parameters to charge and convict private viewers of this material, the Court stated: "[g]iven the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain." (*Osborne v. Ohio* (1990) 495 U.S. 103, 110.) The Court emphasized that it was insufficient to attack only the production and distribution of child pornography, but that penalizing those who view and possess this material was essential to decreasing demand. (*Id.* at pp. 109-110.) It is consumers, like Grant, who drive the market demand for these images and fuel the continued exploitation of children. Thus, Grant's admitted possession of child pornography places him squarely within the chain of this criminal enterprise.

Finally, whether the current statutory scheme offers Grant a chance to be relieved from his lifetime registration as a sex offender or whether it provides him an opportunity to expunge his conviction at some future date is irrelevant to the current question. (Resp.'s Answ., pp. 25-28.) The fact is

that Grant's felony conviction was so serious that he was required to register at a sex offender and that is his current status. The purpose of the attorney disciplinary process is to "ensure that the public, the courts, and the profession are protected against unsuitable legal practitioners" (*In re Higbie* (1972) 6 Cal.3d 562, 570 [explaining the reason for the "moral turpitude" standard]) and to determine whether a crime reflects a member's "unsuitability to be entrusted with the privileges and duties of the legal profession." (*Id.* at p. 573.) The focus of this Court's inquiry differs both in purpose and function from the legislature's determination of the rehabilitation of criminal offenders. The State Bar respectfully submits that Grant's conviction of felony possession of child pornography warrants his summary disbarment. As the State Bar also contends in the companion case of *In the Matter of Frederick Stockard* (Case No. S197532), the currently recommended level of discipline in this case does not reflect this country's condemnation – up to the highest court in the land – of all segments of the child pornography industry. Only Grant's summary disbarment will suffice. And, in light of the egregious and perpetual nature of this crime, the public and the legal profession are best served by finding that felony possession of child pornography constitutes moral turpitude *per se* and that any member convicted of this crime must be summarily disbarred.

C. Only Respondent's Disbarment Will Protect The Public And Promote Confidence In The Legal Profession

1. The Facts and Circumstances Surrounding Grant's Misconduct Warrant a Finding of Moral Turpitude

Grant's narrative of the circumstances resulting in his conviction rings hollow. He asks that the Court believe that he was convicted of a felony for the simple and inadvertent receipt of two unsolicited images of child pornography that he immediately deleted. (See e.g. Resp.'s Answ., pp. 21-22.) This story is completely implausible.

Penal Code section 311.11(a) is what is commonly known as a "wobbler", meaning that it can be charged as either a felony or a misdemeanor. The fact that Grant was convicted of a felony, rather than a misdemeanor, cannot be ignored. Felonies are commonly reserved for the most serious crimes as evidenced by the enhanced punishment they bring and the extra punitive consequence of restriction of rights they impose on convicted felons. Grant's felony conviction strongly suggests a heightened culpability beyond his absurd story that he inadvertently received just two illegal images that he quickly disposed of. The Hearing Department concluded, as should this Court, that "Respondent's testimony that he had knowledge of only two (2) images of child pornography on his computer is not credible." (Hearing Dept. Dec., p. 6, n. 6.) The Hearing Department reached this conclusion after finding that Grant and his attorney

prematurely terminated their review of other images in his criminal matter. The Hearing Department found that "respondent [represented that he] either intentionally failed to review all the images because he was aware of their content, or intentionally ceased viewing the images because he did not want to know their content. Either way, his testimony is not credible." Id.[2]

Grant's misconduct is aggravated by the fact that he intentionally

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[2] To the extent Grant is asking this Court to believe that he was unaware the images he purportedly deleted would not be saved in his hard drive or cache files, this story is inconsistent with his sophistication as a computer user. It is, in fact, one more example of his evasiveness. At trial, Grant testified that at the time his home was searched, he did not realize that deleting a file from his computer did not permanently erase it. (RT, Vol. IV, pp. 34:5-10, 35:19-24.) Yet, prior to that time, he was a COBOL programmer for the Marine Corps. (RT, Vol. IV, pp. 28:15-25, 33:5-20) and built his own computer (RT, Vol. IV, p. 33:21-25). Moreover, his testimony is replete with examples of his experience manipulating computers for the purpose of collecting, storing and retrieving thousands of images of adult pornography. Grant's "knowing" possession of child pornography is well established by his guilty plea. (Penal Code, § 311.11(e) ["knowingly" means "being aware of the character of the matter or live conduct."].) In its ordinary and common sense use, "knowing possession" also means that a person maintains ownership of the material, has knowledge of its location and the ability to control it. Undoubtedly, Grant knew that images of child pornography were stored on his computer. Indeed, this is not a case of a simple, inadvertent viewing of a mere two images of child pornography as Grant proposes. Moreover, Forensic Specialist Amy Wong's testimony of other suspect images undermines the credibility of Grant's story. The additional offensive images found by Wong were discovered not in deleted files that had to be forensically restored or buried or hidden cache files unknown to a casual user, but in folders on his personal desktop computers for obtaining and saving files by the user and on separate CDs copied by Grant. (See RT, Vol. I, pp. 66:19-68:9; 77:4-16; 79:20-21; 84:18-85:1.)

lied to the Court and offered evasive testimony on several occasions and violated his probation, not once, but twice.[3] Nowhere in his Answer does he discuss these factors that weigh heavily in favor of a moral turpitude finding and his disbarment. The reason is because there is nothing to deny. To Grant, ignoring his misconduct at trial and further ignoring his violation of the law post-conviction is preferable to confronting the reality of his behavior and accepting responsibility for his actions.[4]

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[3] Grant contends that his guilty plea (he "willfully, unlawfully and knowingly possessed images of minor under the age of 18 years old exhibiting their genitals for the purpose of sexual stimulation of the viewer") does not mean he was sexually stimulated by child pornography. (Resp.'s Answ., p. 5.) A plain and ordinary reading of his guilty plea, strongly suggests otherwise. At the time Grant signed his guilty plea, he could have written the plea to avoid the ambiguity he now claims. The State Bar believes that the better interpretation is that as the "viewer", Grant was sexually stimulated by the content of the images.

[4] Grant offers that he pleaded guilty on advice of his attorney that possession of child pornography was rendered a strict liability crime in *Tecklenberg v. Appellate Div. of Superior Court* (2009) 169 Cal.App.4th 1402 and that simple "display" of an illegal image was sufficient to convict. (Resp.'s Answ., pp. 3-4.) Even if *Tecklenberg* could be read as Grant suggests, there would be no reason to plead to <u>felony</u> possession, as Grant did, as opposed to misdemeanor possession. Moreover, a plain reading of *Tecklenberg* demonstrates that the appellate court was not suggesting that an individual could be convicted of violating Penal Code section 311.11(a) without knowingly possessing or controlling child pornography. In fact, the court eliminated any doubt as to its conclusion that mere viewing (i.e. "display") would violate the statute. The court stated: "[w]e wish to be clear. Although a few states have prohibited the viewing of child pornography, we do not interpret section 311.11, subdivision (a), as doing

He further attempts to minimize his behavior by representing that in comparison to the amount of adult pornography on his computer, the number of images of child pornography he possessed was miniscule. (See Resp.'s Answ., pp. 8, 22, 29 [the child pornography images he possessed represented only .00019% of the [adult pornography] images on his computer].) The Hearing Department correctly criticized this testimony: "Respondent was knowingly in possession of child pornography. There is not a magic formula of percentage of images containing adult pornography versus child pornography to determine whether or not respondent's criminal conviction involves moral turpitude."

Moreover, it is particularly alarming that in light of his felony conviction, Grant is willing to emphasize that "... any possession of child pornography, whether the two images he received unsolicited and immediately deleted or the 19 images which reasonable minds could differ as to the subject's age, was *incidental* to Mr. Grant's prior behavior of looking at adult internet pornography." (Emphasis in original.) This statement illustrates in no uncertain terms a primary aggravating factor warranting Grant's disbarment; that is, his refusal to comprehend the seriousness of his underlying offense and the seriousness of his subsequent

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so." (*Tecklenberg*, 169 Cal.App.4th at p. 1419.)

violations of the law. Such willful avoidance evidences that Grant's rehabilitation is far from complete and that he poses a continuing risk to the public. (See Hearing Dept. Dec., p. 11 ["Since respondent fails to accept full responsibility for his misconduct, he is not eligible for the mitigating factor of remorse."]; *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 958 ["failure to appreciate the gravity of conduct which is conceded, and a contemptuous attitude toward the disciplinary proceeding, are matters relevant to the appropriate sanction."].) The facts and circumstances surrounding Grant's conviction establish that his offense involves moral turpitude and that disbarment is appropriate.[5]

2. **Evidence and Testimony Regarding Other Images of Child Pornography Should Have Been Admitted**

Whether the additional images contained on Grant's computers should have been admitted was addressed in the Chief Trial Counsel's opening brief. In any case, this evidence is unnecessary to conclude that Grant should be summarily disbarred because his felony conviction for possession of child pornography involves moral turpitude *per se*, or

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[5] Grant's reliance on two references to stipulated conviction referral matters involving convictions for misdemeanor child pornography possession, provide no guidance on the issue of the appropriate sanction in this case. (Resp.'s Answ., pp. 28-29). The appropriate sanction here should be either summary disbarment or, based on the facts and circumstances, disbarment. Moreover, the questionable assertion that the amount of child pornography possessed represented only .00019% of the total amount of his adult pornography collection is fully addressed above.

disbarred under the facts and circumstances of this case – including probation violations, intentional deception during trial and lifetime registration as sex offender. Grant's permanent removal from practice is warranted under either standard. Grant was convicted of a serious criminal offense involving moral turpitude and a two-year actual suspension is simply insufficient. The record fully supports such a finding even in the absence of this additional evidence.

III. CONCLUSION

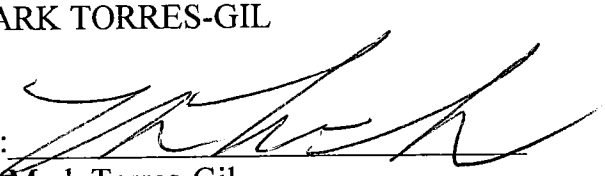
"The concept of moral turpitude depends upon the state of public morals, and may vary according to the community or the times (citation omitted) as well as on the degree of public harm produced by the act in question." (*In re Higbie, supra,* 6 Cal.3d at p. 570.) Since 1982 and the Supreme Court's decision in *New York v. Ferber*, *supra*, to uphold a New York law that criminalized the promotion of child pornography, the states and federal government have demonstrated their heightened resolve to eliminate the scourge of this criminal industry through increased criminal penalties and enforcement. The State Bar respectfully submits that current community standards warrant a finding that a felony conviction of possession of child pornography involves moral turpitude *per se* and that any member so convicted be summarily disbarred. Nevertheless, the record fully supports a finding that under the facts and circumstances of this case,

Grant's misconduct involves moral turpitude thus requiring his disbarment for the protection of the public, the courts and the legal profession.

Dated: February 9, 2012

Respectfully submitted,

STARR BABCOCK
RICHARD J. ZANASSI
MARK TORRES-GIL

By: 
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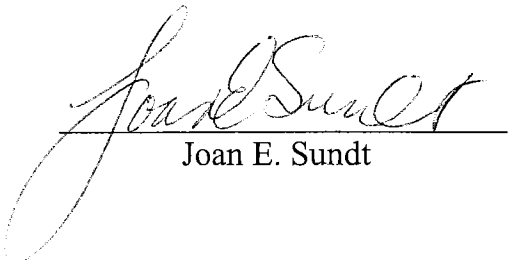
I, Joan E. Sundt, state as follows:

I. I am the secretary to counsel for real party of interest The State Bar of California in the above-entitled action.

II. I certify that the word count of the computer software program used to prepare this document is 3,288 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 9, 2012, at San Francisco, California.



Joan E. Sundt

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Joan Sundt